

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET G. PRICE and CRAIG B. PRICE,

Plaintiffs-Appellants,

v

SCOTT HILLER, CHRISTOPHER KUHL,
SCOTT WATSON, COUNTY OF JACKSON, and
KEVIN CALDWELL,

Defendants-Appellees.

UNPUBLISHED

February 7, 2003

No. 234315

Jackson Circuit Court

LC No. 00-001457-NI

MARGARET G. PRICE and CRAIG B. PRICE,

Plaintiffs-Appellants,

v

SCOTT HILLER, CHRISTOPHER KUHL,
SCOTT WATSON, COUNTY OF JACKSON,
KEVIN CALDWELL, and MICHIGAN STATE
POLICE,

Defendants-Appellees.

No. 234347

Court of Claims

LC No. 00-017607-CM

Before: Neff, P.J., and Hoekstra and O’Connell, JJ.

O’CONNELL, J. (*dissenting*).

I respectfully dissent. Because I believe that our Supreme Court’s decision in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), controls this case, and because defendant police officers did not cause the suspect’s vehicle to strike plaintiff Margaret G. Price’s vehicle, I would affirm the learned opinion of the trial court.

This matter arises from a police chase that extended onto eastbound I-94, where, according to defendant police officers, a car theft suspect, David Walker, began ramming the police vehicle in front of him with the pickup truck he had stolen. However, Daniel Woodward, Walker’s companion in the pickup, testified that the officers rammed the pickup. In any case, the Walker vehicle eventually went onto the median, crossed the westbound lanes of traffic, and

entered an exit ramp, colliding with Margaret's vehicle. Margaret sustained multiple serious injuries and this suit followed. Plaintiffs claimed the police forced the Walker vehicle off the road and into Margaret's vehicle. Defendants denied this and claimed that Walker chose to enter the median and the exit ramp, striking Margaret's vehicle. The trial court concluded that the collision between the police car and the Walker vehicle, if any, was not the proximate cause of plaintiffs' injuries.

Plaintiff raises four issues on appeal. In my view, the threshold question is whether the seminal case regarding governmental immunity, *Robinson, supra*, has retroactive effect in the present matter. When the present case was filed, *Robinson* had not yet been decided. Whether the *Robinson* decision should be applied retroactively is an issue determined de novo. *Curtis v City of Flint*, ___ Mich App ___, ___ NW2d ___ (Docket No. 233576, issued 10/25/2002), slip op, pp 2, 4. In *Curtis, supra*, slip op, 6, this Court held that *Robinson* does apply retroactively to all cases that were pending in the courts below when *Robinson* was decided. Thus, *Robinson* does apply retroactively to the present case.

Plaintiffs next claim that the individual officers are not entitled to governmental immunity because they were not acting within the scope of their authority or with the reasonable belief that they were so acting, and that their actions were the proximate cause of Margaret's injuries. I disagree.

The governmental immunity doctrine, MCL 691.1407, provides in pertinent part:

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

The first inquiry to determine if governmental immunity generally applies to preclude liability in this case is whether the actor was engaged in a governmental function at the time of the alleged tort. MCL 691.1407(1), (2)(b). It is beyond dispute in this case that during the general time period that the accident occurred, defendants were pursuing a suspected car thief in the course of their employment as police officers. In fact, they had a duty to do so. *Robinson, supra* at 447 ("police officers . . . have a sworn duty to apprehend suspected lawbreakers . . ."). Second, defendants were acting or "reasonably believe[d]" they were acting within the scope of

their authority. MCL 691.1407(2)(a). Defendants' testimony claimed as much. Again, the police have a duty to pursue criminal suspects, *Robinson, supra*, even if the chase enters a freeway.¹ Thus, the first and second elements of the governmental immunity doctrine are satisfied in this case.

The third element of governmental immunity is in dispute – whether the individual defendants committed gross negligence that was the proximate cause of plaintiffs' injuries. MCL 691.1407(2)(c). Plaintiffs claim that one defendant officer struck the pickup Walker was driving, causing the pickup to cross the median, enter the oncoming lanes of traffic, enter the exit ramp, and strike Margaret's vehicle. Defendants deny that anyone struck Walker, and instead insist that Walker struck one of defendants' vehicles several times, and then chose to leave the freeway, enter the median, cross the westbound lanes, cross the grassy area between the westbound lanes and the exit ramp, enter the ramp, and strike Margaret's vehicle.

I conclude that plaintiffs' theory of the accident is meritless. Initially, I would hold that defendants' duty to pursue this fleeing suspect onto the freeway, *Robinson, supra*, did not constitute gross negligence – “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(2)(c). In my opinion, according to the record evidence viewed in the light most favorable to plaintiffs, even if one defendant did breach a duty to plaintiffs by striking the Walker vehicle and forcing it off the freeway, the force of this impact did not cause the Walker vehicle to cross the median, cross the oncoming lanes of traffic, make a near 90-degree turn onto the grassy area between the oncoming lanes and the exit ramp, and strike Margaret's vehicle. I emphasize that after Walker's vehicle left the freeway, it traveled the length of approximately 1-1/2 football fields² before making a near 90-degree turn onto an exit ramp. In deciding to make this turn onto the ramp, Walker became the sole proximate cause of this accident. See *Robinson, supra* at 458-459. Anyone with common sense who deliberately travels the wrong way on a freeway understands that an accident is likely to occur.

The accident reconstructionist, who provided direct insight concerning the pivotal question at issue – whether defendants could have caused Walker to strike Margaret, confirmed that it was Walker's choice to travel in the manner he did. While the majority opinion cites the facts that Walker testified he had no braking power and a flat front tire when he left the eastbound lane, Walker also testified that he still had control of (the steering wheel) of the pickup, and that the brakes stopped working before he chose to enter the freeway. Majority opinion, *ante* at 3. Thus, there is no genuine issue of material fact in this case because, even if this Court draws all reasonable inferences in favor of plaintiffs, the impact of the officer-Walker

¹ I note that, although not directly applicable to the present case, innocent persons in the path of a police chase are obligated to remove themselves from the path of the chase. *Robinson, supra* at 451-452.

² Defendant officer Scott Hiller testified that Walker had traveled 100 to 200 yards (or 300 to 600 feet) across the median when he struck an overpass and continued across the median. Defendant officer Kevin Caldwell testified that the distance to the overpass was 500 to 800 feet (or between 100 and 300 yards), and that the distance from there to Margaret's vehicle was 200 feet. Larry Richardson, the accident reconstructionist, opined that Walker traveled a minimum of 520 feet in total, from when he left the eastbound lane of the freeway until he struck Margaret's vehicle.

collision could not have caused the Walker-Margaret collision. See *Betrand v Alan Ford, Inc*, 449 Mich 606, 615; 537 NW2d 185 (1995).

Finally, I would hold that defendants County of Jackson and the Michigan State Police (see MCL 691.1407[1]) are not liable for plaintiff Margaret's injuries either. MCL 691.1405, the motor vehicle exception to governmental immunity, provides:

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner, as defined in Act No. 300 of the Public Acts of 1949

Of primary importance is that the officers' decision to pursue the Walker vehicle is not encompassed by the phrase "operation of a motor vehicle." See MCL 691.1405; see also *Robinson, supra* at 457-458.

[T]he decision to pursue a fleeing motorist, which is separate from the operation of the vehicle itself, is not encompassed within a narrow construction of the phrase "operation of a motor vehicle." Further, allowing a police officer's decision to pursue to be construed as the "operation of a motor vehicle" and therefore fall under an exception to governmental immunity, conflicts with the police officer's duty to apprehend criminal suspects. The officer should be able to rely on MCL 257.602a and MCL 257.653, which mandate that a motorist not wilfully fail to obey a police officer's direction to stop. We thus reject the holding in *Rogers [v Detroit]*, 457 Mich 125; 579 NW2d 840 (1998),] that a police officer's decision to pursue a fleeing vehicle falls within the motor vehicle exception to governmental immunity. [*Robinson, supra*.]

Consequently, in *Robinson, supra* at 456-457, the Supreme Court established a bright line test to determine potential civil liability in police chase cases. The Court held:

Given the fact that the motor vehicle exception must be narrowly construed, we conclude that plaintiffs cannot satisfy the "resulting from" language of the statute where the pursuing vehicle *did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object*. [*Id.* (emphasis added).]

I concur with the trial court in this case when it stated:

. . . Here the hitting on the eastbound lane of I-94 had nothing to do with the ultimate collision. The Walker vehicle wasn't forced off the road by the police, even if you accept Woodward's version that Walker tried to force his way back onto East I-94 and was prevented from doing so by Caldwell and they came into contact. There's absolutely no claim that there was any police vehicle to the right-hand side of Walker, which hit it and forced it off the roadway. Furthermore, Walker traveled at least some 520 feet . . . after leaving the eastbound roadway until it collided with the plaintiff vehicle at the westbound exit ramp. An excessive distance in which to have brought his vehicle to a stop per

Richardson. There is just no scenario in the case at bar whereby there could be liability under this phrase. The officers did not hit the Walker vehicle so as to either force it off the road or into the plaintiff vehicle.

Because defendants' actions did not cause the ultimate collision between the Walker vehicle and Margaret's vehicle, I would affirm the trial court's decision dismissing this action.

Affirmed.

/s/ Peter D. O'Connell